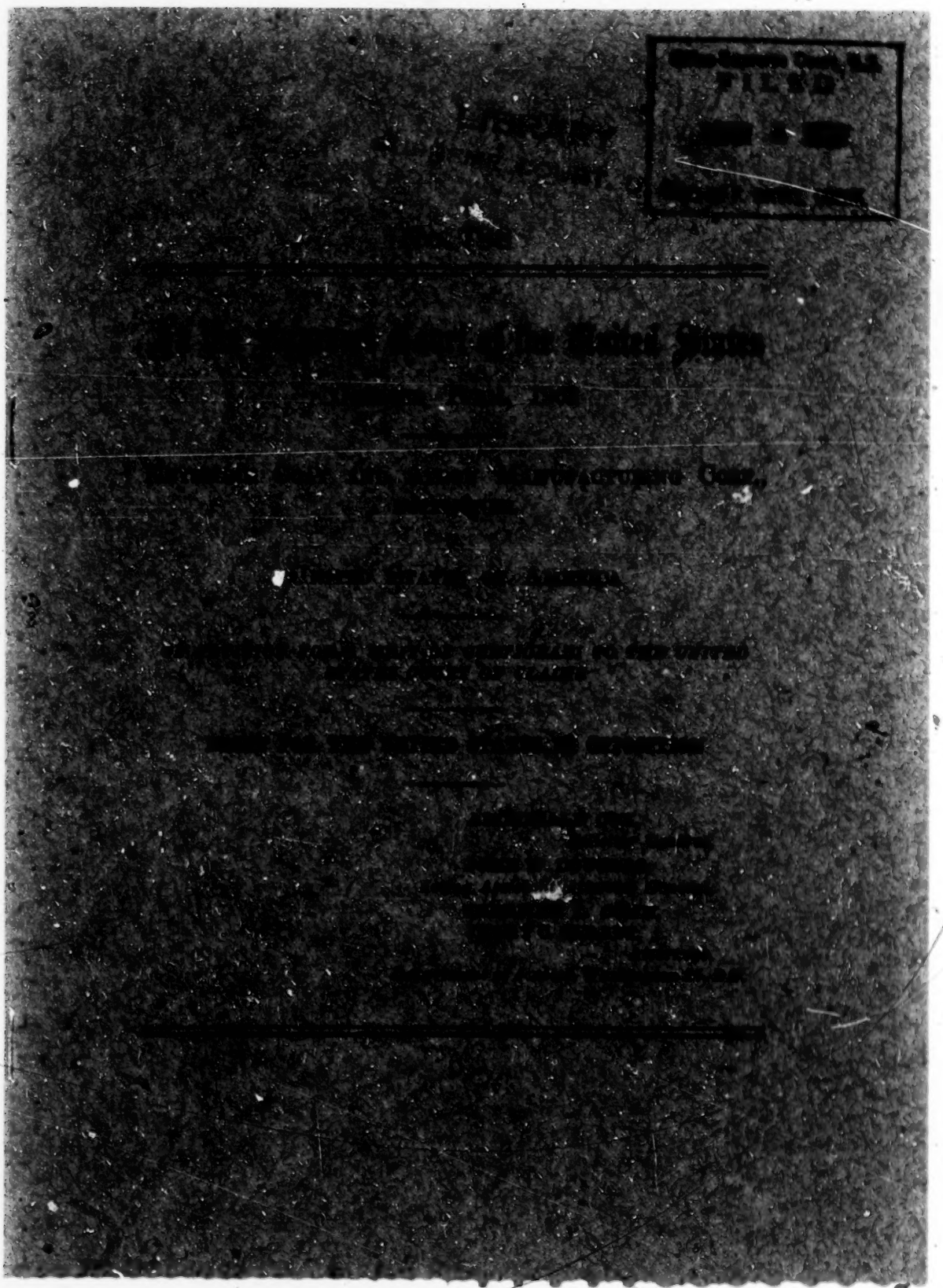

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	1
Constitutional provisions and statutes involved	2
Statement	4
Argument	5
Conclusion	8

CITATIONS

Cases:	
Adams v. *United States ex rel. McCann*, 317 U.S. 269	5
Glidden Co. v. *Zdanok*, 370 U.S. 530	6–7, 8
Kearney v. *Case*, 12 Wall. 275	5
McElrath v. *United States*, 102 U.S. 426	6
United States v. *Sherwood*, 312 U.S. 584	6
Constitution and statutes:	
Constitution of the United States:	
Article III	2
Seventh Amendment	2, 5
28 U.S.C. 2503	3
28 U.S.C. 2503(a)	3
28 U.S.C. 2503(b)	3, 8
28 U.S.C. 2508	3, 6

677304—63

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 788

KEYSTONE COAT AND APRON MANUFACTURING CORP.,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The judgment of the Court of Claims was entered without opinion (Pet. App. A, 9-10).

JURISDICTION

The judgment of the Court of Claims was entered on November 16, 1962. The petition for a writ of certiorari was filed on February 4, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTIONS PRESENTED

1. Whether a plaintiff may assert in this Court that it was unconstitutionally denied a jury trial on

the government's counterclaim in the Court of Claims, when it did not request a jury during the proceedings before the Court of Claims.

2. Whether the Seventh Amendment requires a jury trial on a counterclaim by the United States against a plaintiff in the Court of Claims.

3. Whether petitioner was denied a judicial trial in violation of Article III of the Constitution when the counterclaim of the United States against it was decided by a Commissioner of the Court of Claims.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article III of the Constitution provides in pertinent part:

> SECTION 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.
>
> * * * * * *

The Seventh Amendment of the Constitution provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Section 2503 of Title 28 U.S.C. provides:

28 U.S.C. 2503:

(a) Parties to any suit in the Court of Claims may appear before a commissioner in person or by attorney, produce evidence and examine witnesses. In accordance with rules and orders of the court, commissioners shall fix times for trials, administer oaths or affirmations to and examine witnesses, receive evidence and report findings of fact and, when directed by the court, their recommendations for conclusions of law in cases assigned to them. Hearings shall, if convenient, be held in the counties where the witnesses reside.

(b) The rules of the court shall provide for the filing in court of the commissioner's report of facts and recommendations for conclusions of law, and for opportunity for the parties to file exceptions thereto, and a hearing thereon before the court within a reasonable time. This section shall not prevent the court from passing upon all questions and findings regardless of whether exceptions were taken before a commissioner.

Section 2508 of Title 28 U.S.C. provides:

Upon the trial of any suit in the Court of Claims in which any set-off, counterclaim, claim for damages, or other demand is set up on the part of the United States against any plaintiff making claim against the United States in said court, the court shall hear and determine such claim or demand both for and against the United States and plaintiff.

If upon the whole case it finds that the plaintiff is indebted to the United States it shall

render judgment to that effect, and such judgment shall be final and reviewable.

The transcript of such judgment, filed in the clerk's office of any district court, shall be entered upon the records and shall be enforceable as other judgments.

STATEMENT

This suit was brought by petitioner in the Court of Claims to recover the sum of $1,719.38 due it under a contract with the Navy for 875 pairs of trousers to be delivered by petitioners (Pet. 3). The United States admitted liability but counterclaimed for $6,936.39. The government alleged that petitioner owed it that amount under a different contract providing that petitioner would reimburse the government, at an agreed price, for scrap cloth which resulted from cutting parts for trousers from government furnished material.[1] Petitioner denied liability on this claim (Pet. 3).

The United States moved for summary judgment on its counterclaim on the ground that petitioner had failed to take a timely appeal from a decision of the Contracting Officer under the "disputes clause" in the contract. The Court of Claims denied this motion on June 8, 1960, holding that there had been no decision

[1] The United States made various other counterclaims (Pet. 3), which were then the subject of appeals to the Armed Services Board of Contract Appeals. These appeals were decided adversely to the government except for a claim of $666.63. In its Second Amended Answer and Counterclaim, the United States reduced its demand on these other counterclaims to that sum and petitioner admitted liability (Pet. 3).

under the disputes clause and referred the case to a Commissioner for the resolution of specified factual issues. After trial, the Commissioner found in his report which he filed with the Court of Claims that the government was entitled to recover for the full amount of its counterclaim (Pet. 3). On November 16, 1962, the Court of Claims rendered a decision, without opinion, and ordered judgment entered for the government in the amount of $5,883.64. Petitioner filed no brief with the Court of Claims, and made no oral argument. At no time during the course of the proceedings before the Commissioner or before the Court of Claims did petitioner assert that he was constitutionally entitled to a jury trial, or even desired one, on the government's counterclaim, or that he was unconstitutionally denied a judicial hearing on the counterclaim (Pet. 7).

ARGUMENT

1. Petitioner contends that he was denied trial by jury in violation of the Seventh Amendment by the Court of Claims' determination of the government's counterclaim. Petitioner, however, never asked for a jury trial nor objected to the determination of the counterclaim by the Commissioner and finally the court during the proceeding in the Court of Claims. The right to a jury trial, where it exists, can of course be waived. *Kearney v. Case*, 12 Wall. 275, 281–82, 284; cf. *Adams v. United States ex rel. McCann*, 317 U.S. 269. We submit that petitioner's failure to demand a jury trial, or to take any action challenging the constitutionality of a determination

by the court below of the government's counterclaim without a jury, constituted a waiver of any right to a jury trial in this civil suit.

In any event, it has long been settled that there is no constitutional infirmity in the provision of 28 U.S.C. 2508 which permits the Court of Claims to "hear and determine" counterclaims by the United States without the intervention of a jury. As this Court held in *McElrath* v. *United States*, 102 U.S. 426, 440, this provision:

> informs the claimant that if he avails himself of the privilege of suing the government in the special court organized for that purpose, he may be met with a set-off, counterclaim, or other demand of the government, upon which judgment may go against him, without the intervention of a jury * * *. If the claimant avails himself of the privilege thus granted, he must do so subject to the conditions annexed by the government to the exercise of the privilege.

Petitioner contends that the *McElrath* decision should be reexamined in the light of the recent decision in *Glidden Co.* v. *Zdanok*, 370 U.S. 530. It asserts (Pet. 4) that this Court stated in *United States* v. *Sherwood*, 312 U.S. 584, 587, that the constitutional basis for dispensing with jury trials in the Court of Claims is that the Court of Claims is a legislative and not a constitutional court. Therefore, petitioner argues (Pet. 5), the decision in *Zdanok* that the Court of Claims is a constitutional court is a tacit rejection of the *McElrath* rule.

The short answer to petitioner's contention is found in *Glidden Co.* v. *Zdanok* itself. There, the plurality

opinion of Mr. Justice Harlan expressly stated that the constitutionality of the procedure dispensing with jury trials on counterclaims by the government in the Court of Claims was not dependent on whether the Court of Claims was a constitutional or legislative court (370 U.S. at 572):

> A preliminary consideration that need not detain us long is the absence of provision for jury trial of counterclaims by the Government in actions before the Court of Claims. Despite dictum to the contrary in *United States* v. *Sherwood*, 312 U.S. 584, 587, the legitimacy of that nonjury mode of trial does not depend upon the supposed "legislative" character of the court. It derives instead, as indeed was also noted in *Sherwood*, *ibid.*, from the fact that suits against the Government, requiring as they do a legislative waiver of immunity, are not "suits at common law" within the meaning of the Seventh Amendment. *McElrath* v. *United States*, 102 U.S. 426, 439–440. The Congress was not, therefore, required to provide jury trials for plaintiffs suing in the Court of Claims; the reasonableness of its later decision to obviate the need for multiple litigation precludes a finding that its imposition of amenability to nonjury set-offs was an unconstitutional condition. Cf. *Minneapolis & St. L.R. Co.* v. *Bombolis*, 241 U.S. 211; see 74 Harv. L. Rev. 414, 415 (1960).

2. Petitioner's argument that it was unconstitutionally denied a judicial proceeding on the government's counterclaim is also without merit. Referring the case to a Commissioner for a preliminary deter-

mination, as the plurality opinion noted in *Glidden Co. v. Zdanok, supra*, 370 U.S. at 572, is "conformable in all respects with the practice of masters in chancery." Concededly, Commissioners of the Court of Claims are not judges, but petitioner was not deprived of a hearing before a judge by the procedures of the Court of Claims. Although he chose not to do so (Pet. 3), it was open to petitioner to make exceptions to the report of the Commissioner, both through a brief and oral argument before the court.

Thus, contrary to petitioner's assumption (Pet. 6), the counterclaim was not "determin[ed]" by the Commissioner, but by the Court of Claims. The report of a Commissioner is advisory only (28 U.S.C. 2503(b)), and, in itself, has no effect on the rights of the parties. It was only when the Court of Claims entered judgment that a decision was made.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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